United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2393

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-2393

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

RESEARCH AUTOMATION CORPORATION, et al.,

Defendants,

KONSTANTINOS M. TSERPES,
BASIL MARTOS,
ATHAN HAMOS,

Appellants.

Appeal from the United States District Court
for the Southern District of New York

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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COUNTERSTATEMENT OF THE ISSUE PRESENTED

Did the district court abuse its discretion in granting a motion, pursuant to Rule 37(d) of the Federal Rules of Civil Procedure, to strike the answer of and grant a default judgment against a defendant who had wilfully refused to be sworn at his own deposition and disrupted the deposition of other defendants to the extent that those depositions had to be adjourned?

COUNTERSTATEMENT OF THE CASE

On August 7, 1974, the United States District Court for the Southern District of New York, Sylvester J. Ryan, J., in an enforcement action brought by the Securities and Exchange Commission, entered a final judgment and order ("Order"),[1/] granting the Commission's motion for an order striking the answers of defendants Research Automation Corporation ("RAC") and Konstantinos M. Tserpes, and entering judgment by default for permanent injunctive relief against them. The Order permanently enjoined RAC and Tserpes from further violations of the anti-fraud provisions of the federal securities laws. (Order pp. 2-3) The Order also granted the Commission's motion for a protective order vacating proposed depositions of Commission counsel, and denied the defendants' motions(a) for an order permitting defendants to tape record the remainder of the depositions noticed, excluding certain allegedly improper questions, and directing that all future depositions be held in the United States Court House; (b) for an order compelling the Commission to produce certain documents; and (c) for leave to file a proposed third party complaint against the United States. (Order pp. 3-4) Tserpes and defendants Basil Martos and Athan Hamos have appealed from that order.

1/ "A ___" refers to pages of the appendix to the brief of the appellants. The August 7, 1974, order is not among the numbered pages of the appendix, but is located immediately after the docket sheet. Documents contained in the record but not reproduced in the appendix are identified by the date of filing as reflected in the docket sheet.

FACTS

a. The Defendants.

RAC was incorporated in New York on February 2, 1965. It is engaged in the design, development and manufacture of industrial machinery. Tserpes is the founder, president, treasurer, majority stockholder and a director of RAC. He controls the day to day operations of the corporation. Defendants Martos and Hamos are vice-presidents of RAC and Hamos is also a director. Each owns less than 10% of RAC's outstanding common stock, and neither devotes his full time to the affairs of the corporation. (Complaint, August 17, 1972, p. 2; Jacobs Aff., August 24, 1972, pp. 2-3.)

b. The Commission's Injunctive Action and the First Appeal.

On August 17, 1972, the Commission filed a complaint against RAC, Tserpes, Martos and Hamos, charging violations of the registration provisions of the Securities Act of 1933 (Section 5, 15 U.S.C. 77e) and of the antifraud provisions of that Act (Section 17(a), 15 U.S.C. 77q(a)) and of the Securities Exchange Act of 1934 (Section 10(b), 15 U.S.C. 78j(b)) and rules and regulations thereunder (Rule 10b-5, 17 CFR 240.10b-5), in connection with the offer and sale of securities of RAC.

On November 8, 1972, on the Commission's motion and supporting affidavit (Jacobs Aff. Aug. 24, 1972), the district court entered an order of preliminary injunction. The order was entered by default, the defendants, after one adjournment, failing timely to appear and oppose the Commission's motion. The court's order recited that the

Commission had made a prima facie case, but no formal findings of fact and conclusions of law were made pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. On November 30, 1972, the defendants filed a notice of appeal to this Court.

In the meantime, the Commission determined that it wished to withdraw its charges of violations of Section 5 of the Securities Act, and also determined that, under the circumstances of the case, findings of fact and conclusions of law were desirable to aid this Court in its review. Accordingly, on February 13, 1973, the Commission moved this Court for an order remanding the case to the district court for findings and conclusions. On March 9, 1973, this Court entered an order (A 1) granting that motion. Thereafter, in the hope that the case could be settled, the Commission did not oppose a motion by the defendants to vacate the order of preliminary injunction and to dismiss the allegation of violations of Section 5 from the Commission's complaint, and an order to that effect (A 2) was entered on October 23, 1973.

c. The Depositions and the Commission's Motion Under Rule 37(d).

When the hoped-for settlement did not materialize, the Commission continued the prosecution of its action. A deposition of Tserpes personally, and of RAC by Tserpes as its president, was noticed for May 20, 1974, at 9:30 a.m., at the Commission's New York Regional Office. In addition to appearing personally, Tserpes was to bring certain documents to the deposition (Notice of Deposition of RAC and Tserpes, May 14, 1974).

On May 20, 1974, Tserpes appeared at the Commission's office and, when asked to enter the room where the deposition was to be held, refused and demanded to see William D. Moran, Administrator of the New York Regional Office[2/] (Jacobs Aff. accompanying motion to strike answer and enter judgment by default, June 13, 1974, p. 2). Tserpes was advised that a court reporter, a court approved interpreter and Mark N. Jacobs, the Commission attorney who was to conduct the deposition, were waiting for him to begin the examination, but he refused to leave Mr. Moran's waiting room until 10:40 a.m., when Mr. Moran had to interrupt a meeting he was attending to examine the material Tserpes had brought and sign for their receipt (id.).

Once Tserpes finally entered the room where the deposition was to be taken, he insisted that a discussion which, contrary to his assertions (Br. 6, A 35), had not been transcribed by the reporter, be entered on the transcript (Supp. App. I 2-3),[3/] engaged in a discussion with a witness in the room (id. 5-6), stated repeatedly that he did not trust Mr. Jacobs (id. 7, 8, 14, 15, 16) and did not wish to be interrogated by him (id.) or by "somebody who is in the same group as Mr. Jacobs" (id. 14), accused Mr. Jacobs of causing the

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2/ Tserpes made this demand because the notice of deposition had been sent out over the typed signature of Mr. Moran, as is much of the New York Regional Office's correspondence (A35).

3/ The transcript of Tserpes' deposition was transmitted to the district court together with Magistrate Raby's report dated June 25, 1974 (A 6, 9), but has not been reproduced in the appendix. That transcript has been reproduced, in its entirety, as Supplemental Appendix I to this brief. "Supp. App. I ___" refers to pages of that transcript.

delay in commencing the deposition (id. 8-12), and called Mr. Jacobs a liar (id. 11, 16-17). Finally, when Mr. Jacobs repeatedly instructed the reporter to swear Tserpes in (id. 12, 13, 14) and directly asked Tserpes if it was his intention to refuse to be sworn and examined (id. 14-15, 15, 16), Tserpes merely repeated that he did not trust Mr. Jacobs. At that point, Mr. Jacobs adjourned the deposition (id. 17).

Thereafter, the depositions of Martos and Hamos were held, respectively, on May 21 and May 29, 1974.[4/] Tserpes attended both depositions, ostensibly in his capacity as his own attorney for the purpose of cross-examination. During the course of these depositions he continually spoke out of turn, answered questions for the deponents, engaged in cross-conversations, and directed personal attacks against Mr. Jacobs, to the extent that it became impossible to conduct either deposition, and Mr. Jacobs was forced to adjourn them both. (Supp. App. II 54-57; Supp. App. III 44-48.)

As a result of Tserpes actions at these three depositions, the Commission, on June 13, 1974, moved the district court pursuant to Rule 37(d) of the Federal Rules of Civil Procedure for an

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4/ The transcripts of the depositions of Martos and Hamos were also transmitted with Magistrate Raby's report of June 25, 1974 (A 6, 9). The portions of these transcripts at which Tserpes spoke are reproduced as Supplemental Appendices II and III respectively. "Supp. App. II ___" and "Supp. App. III ___" refer to pages of these transcripts.

order striking the answers of RAC and Tserpes and entering a judgment by default against them. This motion, as well as several others, was referred to United States Magistrate Harold J. Raby. In reports dated June 25, 1974 (A 3-9), and July 17, 1974 (A 17-21), Magistrate Raby recommended that the Commission's motion to strike be granted and that the other motions be decided in the Commission's favor. In his Order of August 7, 1974, Judge Ryan stated that he had considered the papers filed by the parties, the reports of Magistrate Raby and the objections of the defendants to those reports (A 10-16, 22-24). Finding the objections to be without merit, Judge Ryan entered the Order appealed from.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN STRIKING TSERPES' ANSWER AND ENTERING A JUDGMENT BY DEFAULT.

Rule 37(d) of the Federal Rules of Civil Procedure provides, in pertinent part:

> "If a party or an officer, director, or managing agent of a party . . . fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule."

The actions authorized under Rule 37(b)(2) include:

* * *

> "(C) An order striking out pleadings or parts thereof, . . . or rendering a judgment by default against the disobedient party."

Recently, in Flaks v. Koegel, 504 F. 2d 702, 707 (C.A. 2, 1974), this Court reaffirmed that "[t]here is no doubt that the sanction of judgment by default, although most severe, is within the discretion of the trial judge. Trans World Airlines, Inc. v. Hughes, 332 F. 2d 602, 614 (2d Cir. 1964); Gill v. Stolow, 240 F. 2d 669, 670 (2d Cir. 1957); 8 C. Wright & A. Miller, Federal Practice & Procedure §2284 (1970)." The record of Tserpes' behavior throughout this litigation, and especially at the depositions, clearly demonstrates that Judge Ryan did not abuse his discretion in entering a default judgment.

In 1970, Rule 37 was amended, deleting the requirement that a party "wilfully" fail to appear for a deposition before sanctions under Rule 37(d) could be applied. Wilfulness, however, remains a factor to be taken into account by the district court in determining the severity of the sanction. Notes of Advisory Committee on Rules, 28 U.S.C.A. Rule 37, at 45, 47 (Supp. 1974); see Societe Internationale v. Rogers, 357 U.S. 197, 208, 212 (1958); Dorsey v. Academy Moving & Storage, Inc., 423 F. 2d 858, 860 (C.A. 5, 1970); 4A Moore, Federal Practice, ¶37.05 p. 95 (2d ed. 1973).

A default judgment issued pursuant to Rule 37(d) "is only sustainable if it has been demonstrated that the defendants' failure to comply was in fact due to willfulness, bad faith or fault, and not to an inability to comply." Flaks v. Koegel, supra, 504 F. 2d at 709.[5/] Wilful failure under Rule 37(d) "does not necessarily include a wrongful intent to disobey the rule. A conscious or intentional failure to act, as distinguished from an accidental or involuntary

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5/ In Flaks, this Court reversed, as an abuse of discretion, an order striking an answer and entering judgment by default pursuant to Rule 37(d). But the circumstances of that case differed significantly from those of the instant case. In Flaks, the defendant swore that he was unable to comply with discovery directives because of communications problems and inability to retain counsel. 504 F. 2d at 709-710. Also, the district judge had made no finding of wilfulness. Id. at 9. Here, Tserpes does not argue that service was defective. Indeed, he admittedly was present at the Commission's office on the day of all depositions. And, while Judge Ryan's order of August 7, 1974, makes no express finding of wilfulness, the order adopts Magistrate Raby's report of June 25, 1974 (A 3-9), which leaves no doubt that the conduct was wilful.

non-compliance is sufficient to invoke the penalty." United States for the Use of Western & Brooker Co. v. Continental Cas. Co., 303 F. 2d 91, 92-93 (C.A. 4, 1962); see also Brookdale Mill, Inc. v. Rowley, 218 F. 2d 728 (C.A. 6, 1954). Under this definition, Tserpes' conduct can only be characterized as wilful.

While Tserpes was physically present at the Commission's New York Regional Office at approximately the time for which his deposition was noticed, this did not constitute an appearance within the meaning of Rule 37(d). In Bourne v. Romero, 23 F.R.D. 292, 296-297 (E.D. La., 1959), then United States District Judge J. Skelly Wright stated:

> "Defendants' refusals to give oath were tantamount to refusals to make discovery and their physical presence at the site did not constitute 'appearances' in the sense required by the Federal Rules of Civil Procedure . . . . Rule 37(d) is applicable because of their wilful refusal to be sworn and testify."

See also Pioche Mines Consolidated, Inc. v. Dolman, 333 F. 2d 257 (C.A. 9, 1964); Fong v. United States, 300 F. 2d 400 (C.A. 9, 1962); Peitzman v. City of Illmo, 141 F. 2d 956 (C.A. 8), certiorari denied, 323 U.S. 718 (1944); Brady v. Hearst, 281 F. Supp. 637 (D. Mass., 1968); cf., Bourgeois v. El Paso Natural Gas Co., 20 F.R.D. 358 (S.D. N.Y., 1957), affirmed, 257 F. 2d 807 (C.A. 2, 1958).

The transcripts of the Commission's attempts to depose Tserpes, Martos and Hamos speak for themselves. They show unequivocally that, at his own deposition, Tserpes not only refused to be sworn, but conducted

himself in a manner aptly described by Magistrate Raby "as to make a farce out of the judicial processes of [the district] . . . court" (A 6). The statements in the appellants' brief, that the adjournment of the deposition took place at the time of a dispute over the wording of the receipt for documents (Br. 9), and that Tserpes was willing to answer all questions (Br. 10), are clearly belied by the transcript.

At the depositions of Martos and Hamos (Supp. App. II and III), Tserpes "outrageously injected himself into the depositions which the S.E.C. was trying to conduct respecting the other two defendants and in effect, by the process of filibuster made it impossible to depose the other two witnesses" (A 6). This conduct, taken together with his conduct at his own deposition, and the barrage of other motions decided adversely to the defendants by Judge Ryan (discussed, infra, pp. 13-23) make it clear that Tserpes has wilfully sought to impede the Commission's case by any means possible. This "most outrageous and disgraceful sabotage" (A 6) should not be tolerated by this Court. 6/

6/ The cases cited by Tserpes (Br. 9-10) in support of his argument that the district court erred in striking his answer are inapplicable. In Dunn v. Pennsylvania R. Co., 96 F. Supp. 597 (N.D. Ohio, 1951), the court, relying upon its discretion not to issue an order imposing sanctions, held that it was not apparent that failure to answer interrogatories was wilful. The court also noted that the case had been removed from a state common pleas court, and that a more plausible explanation for the failure was counsel's lack of familiarity with the Federal Rules. Mauer-Neuer, Inc. v. United Packinghouse Workers, 26 F.R.D. 139 (D. Kansas, 1960), was another example of the exercise of district court discretion in declining to issue an order. In Scarlatos v. Kulukundis, 21 F.R.D. 185 (S.D. N.Y., 1957), the court declined to impose sanctions for a plaintiff's failure to appear for a deposition, when the plaintiff had been returned, totally disabled, to his native country. In Gill v. Stolow, 240 F. 2d 669 (C.A. 2, 1959), this court reversed a default order when it was

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On the one hand, Tserpes vigorously claims his inability to speak and understand the English language, to the extent of requiring a court-appointed interpreter (Br. 14-15, see, infra, p. 17, n 11). On the other hand, while claiming no financial disability, he nevertheless insists upon appearing pro se, and has filed highly literate documents both in this Court and in the district court. This behavior can only be described as part of Tserpes overall scheme to disrupt and frustrate this proceeding in every way possible.

Tserpes has also intimated (Br. 9) that his status as "a non-lawyer" should somehow excuse his behavior at the depositions because he was "unfamiliar with Federal procedure." But it has been uniformly held that, while a defendant has the right to represent himself, such an appearance confers no additional rights upon a party, and he is expected to conform to the rules of evidence and procedure. See, e.g., Hutter Northern Trust v. Door County Chamber of Commerce, 467 F. 2d 1075 (C.A. 7, 1972); Mazique v. Mazique 356 F. 2d 801 (C.A. D.C.) certiorari denied, 384 U.S. 981 (1966); Murphy v. Citizens Bank of

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6/ (Continued)

shown that the party was overseas at the time of notice, was not personally served, and made a subsequent appearance. And, in Saltzman v. Birrell, 156 F. Supp. 538 (S.D. N.Y., 1957), the court held that a defendant's claim that there had been no notice of motion for sanctions did not justify vacating an order of default, but did indicate its willingness to reconsider should the party present himself for his deposition. These cases are all distinguishable from the facts of instant case.

Clovis, 244 F. 2d 511 (C.A. 10, 1957); Barnes v. United States, 241 F. 2d 252 (C.A. 9, 1957); Morgan v. Sylvester, 125 F. Supp. 380 (S.D. N.Y., 1954), affirmed, 220 F. 2d 758 (C.A. 2), certiorari denied, 350 U.S. 867 (1955); cf., Dioguardi v. Durning, 139 F. 2d 774 (C.A. 2, 1944). This Court should not permit Tserpes to utilize his status as a pro se defendant and his alleged inability to speak or understand English as weapons to frustrate further the Commission's enforcement of the federal securities laws.

II. OTHER ISSUES RAISED BY THE APPELLANTS ARE NOT PROPERLY BEFORE THIS COURT.

Several factors, including the number of motions decided by Judge Ryan in the Order and the manner in which the pro se appellants have presented this case to the court, have unnecessarily complicated this appeal. For the reasons discussed below, the only issue properly before this Court is the propriety of Judge Ryan's striking of Tserpes' answer and entering a default judgment against him.

A. The District Court's Order, Except to the Extent That It Granted a Final Judgment, Is Interlocutory and Non-Appealable.

The Order does not purport to strike the answers of Martos and Hamos or enter any final judgment against them, so the Commission's injunctive action is still progressing with respect to those defendants. Their appeal, therefore, is only from the district court's granting of the Commission's motion for a protective order, and its denial of the defendants' motions to compel the production of certain documents, to tape record future depositions, hold these depositions in the federal

courthouse, and limit the scope of the questions asked, and for leave to file a third party complaint against the United States. These orders are all interlocutory and therefore not appealable. 28 U.S.C. 1291; cf., Alexander v. United States, 201 U.S. 117 (1906); Cobbledick v. United States 309 U.S. 323 (1940); American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F. 2d 277 (C.A. 2, 1967); 9 Moore, Federal Practice, ¶110.13[2], pp. 153-159.[7/] The former motions are all simple discovery motions and, if necessary, could be reviewed in an appeal of a final judgment on the merits. And, assuming the district court had jurisdiction to entertain the defendants' claim against the United States,[8/] such a claim could be brought in a separate action. The appeals of Martos and Hamos, then, are not properly before this Court and should be dismissed.

With respect to Tserpes, the situation is slightly different. Judge Ryan did enter a final judgment by default against Tserpes. This aspect of the order is appealable and is discussed in Point I, supra. Should this Court affirm the default judgment against Tserpes, the other matters raised by this appeal become moot as to him, since no further proceedings are required. On the other hand, should this Court determine to reverse the default judgment and remand to the district court for further proceedings, for the reasons discussed

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7/ The question of appeal by permission pursuant to 28 U.S.C. 1292(b) is not raised here, since no motion for certification was made to the district court.

8/ See, infra, pp. 20-23.

above, Tserpes' appeal, like those of Martos and Hamos, becomes interlocutory and should be dismissed. We have, however, included a brief discussion on the merits of Judge Ryan's decisions on these other motions as Point III of this brief, pp. 16-23, infra.

B. RAC Is Not an Appellant in This Case.

Throughout this litigation, Tserpes, Martos and Hamos have purported to represent the interests of RAC, and their brief on appeal continues to do so (Br. 8, 9). But it is well settled that, with some exceptions, [9/] a corporation may not appear in court except through an attorney. Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 828 (1824); 7 Am. Jur. 2d ¶¶6, 12, pp. 46-47; 19 ALR 3d 1073. None of the individual appellants is an attorney, and their status as corporate officers does not permit them to represent RAC on appeal.

But, in any event, the entry of a default judgment against RAC because of the actions of Tserpes, its president, was proper. There is no assertion that RAC was not properly served with notice of the deposition, and Rule 37(d) provides for sanctions against a party in the event that "an officer, director or managing agent of a party" fails to appear at a deposition.

9/ See, generally, 19 ALR 3d 1073. It has been held that, in some circumstances, where a corporate agent is a party along with the corporation, the corporation may appear through the agent. See Willheim v. Murchison, 206 F. Supp. 733 (S.D. N.Y., 1962), appeal dismissed, 312 F. 2d 399 (C.A. 2, 1963). RAC is a New York corporation, and it is clear that under New York practice a corporation may not appear otherwise than through an attorney. 19 ALR 3d 1073, 1079-1082.

III. THE DISTRICT COURT DID NOT ERR IN ITS DECISION OF THE OTHER MOTIONS BEFORE IT.

We turn now to Judge Ryan's decisions on the motions other than the Commission's motion pursuant to Rule 37(d). In discussing these decisions on their "merits," however, the Commission by no means acknowledges that they are properly before this Court. On the contrary, the defendants' attempt to depose Commission counsel and the other motions before the district court were totally frivolous, and part of an overall scheme calculated to harass, oppress and burden the Commission, and delay the progress of this action.[10/]

A. The Motions Related to Discovery Were Properly Decided Adversely to the Defendants.

All but one of the remaining motions decided by Judge Ryan in the Order were in some manner related to discovery. On May 29, 1974, the defendants noticed the depositions of Commission attorneys Mark N. Jacobs (A 25-26), William Nortman (A 27-28) and Thomas R. Bierne (A 29-30). All three of these notices directed Commission counsel to produce certain documents relating to the Commission's investigation of this action. On June 10, 1974, Judge Ryan, at the urging of the Commission, ordered the

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10/ In his June 25, 1974, report to Judge Ryan (A 3-9), Magistrate Raby described the attempt to examine Commission counsel as "obviously another ploy, an attempt to harass the S.E.C. in pursuit of its legal functions" (A 7). He also described the other motions filed by the defendants as "another manifestation of the desire of Tserpes and his co-defendants to be as obstreperous and obnoxious as possible" (A 8).

defendants to show cause why a protective order should not issue vacating the proposed depositions, and adjourned the depositions pending a hearing. 11/

On June 18, 1974, the Commission, already having objected to the proposed depositions of its counsel, filed a response to the defendants' requests for documents. Contrary to the assertions by the appellants (Br. 10), the Commission stated that it would make all transcripts available to the defendants for their inspection. The Commission did not object to the defendants obtaining copies of those transcripts, but noted that copies would have to be ordered from the reporting service, since the Commission's contract with the service would prohibit the Commission from supplying copies to the defendants. The Commission refused to produce any documents, such as reports and memoranda, that would be privileged as attorney work-product, and noted that some requested documents did not exist. The Commission further agreed to produce other documents, even those which were already in the possession of the defendants or readily available to them, through discovery or otherwise.

11/ The motion for a protective order, as well as several other motions, were noticed for hearing on June 21, 1974, before Magistrate Raby. At the hearing, Tserpes made a "motion," insisting that the defendants did not understand the proceeding and had the legal right to a court-appointed interpreter. Assuming the question of an interpreter is somehow relevant to this appeal, Magistrate Raby properly denied the "motion." The appellants (Br. 14-15) claim that Rule 43(f) gives a party the "fundamental right" to an interpreter and imply that the district court or the Commission were required to inform them of this "right." This ignores that the rule grants discretion in the court to appoint an interpreter. Magistrate Raby's report of June 25, 1974 (A 4-6) clearly sets forth the reasons for not appointing an interpreter.

In the Order, Judge Ryan granted the Commission's motion for a protective order, and denied the defendants' motion to compel the Commission to produce all requested documents. He also denied the defendants' motion for permission to tape record the depositions, to hold the depositions in the district court and restrict the scope of oral examination of Martos and Hamos.

The appellants (Br. 8, 12) recognize the applicability of the doctrine of Hickman v. Taylor, 329 U.S. 495 (1947). While recognizing the need for liberal discovery, the Hickman decision nevertheless stands for the principle that attorney work-product is not discoverable unless the party seeking discovery makes a strong showing of substantial need and that the material is otherwise unavailable to him.

Here, the documents that the Commission has declined to produce as work-product are memoranda and reports prepared by Commission counsel as part of their investigation and preparation of the case. As such, they are clearly privileged, absent the required showing, which Tserpes has not made.

Commission counsel have no independent knowledge of the facts underlying the situation. All of their knowledge is based upon the investigation conducted after the acts complained of had occurred. In his affidavit of August 24, 1972, in support of the Commission's motion for preliminary injunction, Mr. Jacobs specifically set forth the basis for the Commission's allegations, citing witnesses and documents. All of those sources are available to the defendants for their own discovery,

and many documents originated with the defendants. Commission counsel should not be required to perform functions the defendants can and should do by themselves.

The appellants' desire to tape record the depositions arises from what they term "a serious question . . . as to the completeness of the transcript" (Br. 12). But, aside from some unfounded accusations by Tserpes, there is no evidence that the transcripts are anything other than complete and accurate. The depositions were transcribed by three different independent reporters and notaries public, who have certified their accuracy and completeness (Supp. App. I 18; Supp. App. II 58; Supp. App. III 50). None of these reporters has any interest in the outcome of the case and the appellants' accusations against them constitute a totally unwarranted attack upon their veracity. The district court, which has discretion under Rule 30(b)(4) to order that the testimony at a deposition be recorded by other than stenographic means, certainly did not abuse that discretion in declining to do so. There was likewise no reason for the district court to limit the scope and manner of the discovery under Rule 30(d). That rule permits the district court to limit discovery "upon a showing that the examination is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party." No such showing has been or could be made in this case. If any questions are directed toward Martos or Hamos which they feel they are incapable of answering, they need only decline to do so on those grounds.

B. The District Court Properly Denied the Defendants' Motion for Leave to Sue the United States as a Third Party Defendant.

The remaining motion decided adversely to the defendants by Judge Ryan in the Order was a motion for leave to file a "third party complaint" or "counterclaim" against the United States. As fully discussed by Magistrate Raby in his report of July 17, 1974 (A 17-21), the district court lacked jurisdiction to entertain the proposed joint claim for $6,400,000 (A 59) and Tserpes' individual claim for $1,300,000 (A 61). Judge Ryan considered this report and found the defendants' objections to the report to be without merit (Order p. 2).

But even if the district court somehow did have jurisdiction over the claim, the claim rests upon presumptions which stem from a complete (and, under the circumstances of the case, probably intentional) misinterpretation of the process of registering a public offering of securities. In his brief (Br. 15), Tserpes states that

> ". . . the Commission and its staff frustrated and obstructed the defendants from proceeding with a public stock offering pursuant to the exemption to registration known as Regulation A."

The Commission's Regulation A, 17 CFR 230.251, et seq., promulgated pursuant to the authority of Section 3(b) of the Securities Act of 1933, 15 U.S.C. 77c(b), exempts from registration under that Act public offerings of securities aggregating less than $500,000. An issuer

wishing to take advantage of the exemption must file a notification with the Commission, 17 CFR 230.255. Ten days after the filing of the notification, by operation of the regulation, the notification becomes effective and the offering may commence (id.), unless the Commission formally acts to suspend the exemption, 17 CFR 240.261. During the period from filing until the notification becomes effective, the Commission's staff may make informal comments and suggestions as to the content of the notification. The issuer, however, is not obliged to await a staff comment letter, nor is it obliged to comply with any comments received, before commencing the offering. Should the Commission find the notification to be deficient, the only way for it to prevent the offering from going forward is to enter a formal order of suspension. If it finds that there have been violations of the securities laws, the Commission may bring an injunctive action seeking to enjoin further violations, as has been done in this case.

The facts surrounding RAC's proposed Regulation A offering may be briefly summarized as follows.[12/] RAC first filed a notification and offering circular on November 25, 1970. The material was returned to RAC on November 30, 1970, with a letter from the Commission's New York Regional Office which advised that the material was unacceptable for

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12/ A more detailed recitation of the circumstances surrounding the proposed offering may be found in the affidavit of Alexander Bienstock in opposition to the motion for leave to file a third party complaint, filed July 10, 1974.

processing, and gave five of the more serious reasons upon which that statement was based. On March 10, 1972, RAC filed another notification, which, though acceptable for processing, was found to be too deficient to be the subject of a comment letter. More than two years later, on May 16, 1974, an amendment to the notification was filed and, on July 1, 1974, a forty-page comment letter was sent to RAC.

On August 17, 1972, the Commission instituted this action. On the basis of 17 CFR 230.261(a)(5) and (6) of Regulation A, the commencement of that action could have been used as a ground to suspend the filing. Moreover, pursuant to 17 CFR 230.261(a)(4), the entry of a temporary restraining order on August 24, 1972, was ground for suspension. But the Commission has not entered any suspension order with respect to RAC, and while it would have done so at its peril, RAC was free to commence its offering on the eleventh day following the filing of the notification. Therefore, any statement that the Commission or its staff has "frustrated and obstructed" RAC from proceeding with its offering is without basis.

Tserpes also asserts (Br. 15) that, with regard to comment letters and injunction proceedings:

> "Even after the facts were obvious to the Commission that the defendants had perpetrated no fraud, nor violated the anti-fraud provisions of the Securities

Acts and regulations, it persisted in negligently perpetuating the impediments to defendants' stock offering." 13/

Even if the "facts" of the defendants' innocence were not limited to their own self-serving assertions that they have done nothing wrong, the district court would have no jurisdiction to review the Commission's decision to institute or maintain its action. Such a decision is clearly "committed to agency discretion by law" and therefore immune from judicial review. Section 10 of the Administrative Procedure Act, 5 U.S.C. 701(a)(2); Section 20(b) of the Securities Act of 1933, 15 U.S.C. 77t(b); Section 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. 78u(e). See, e.g., Ewing v. Mytinger & Casselberry, 339 U.S. 594 (1950); Third Avenue Ry. Co. v. Securities and Exchange Commission, 85 F. 2d 914 (C.A. 2, 1936); Securities and Exchange Commission v. Andrews, 88 F. 2d 441 (C.A. 2, 1937); Waterhouse v. Mitchell, No. 14,872 (C.A. 4, February 16, 1971), certiorari denied, 403 U.S. 918 (1971); Leighton v. Securities and Exchange Commission, 221 F. 2d 91 (C.A. D.C.), certiorari denied, 350 U.S. 825 (1955); Administrative Procedure Act Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 38, 275 (1946). It is thus apparent that the defendants had no basis whatever for either a third party complaint or counterclaim against the United States.

13/ The appellants (Br. 3) imply that the purpose of the Commission's injunctive action is to prohibit them from selling RAC stock. The action is to prohibit further violations of the antifraud provisions of the federal securities laws. Appellants would, of course, be free to sell stock in compliance with those laws.

CONCLUSION

For the reasons stated above, (1) the district court's decision to strike Tserpes' answer and enter a final judgment by default against him should be affirmed; and (2) the appeal as to the other aspects of the district court's Order should be dismissed as interlocutory and non-appealable or, in the alternative, those aspects of the Order should also be affirmed.

Respectfully submitted,

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January 1975

SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

OFFICE OF THE
GENERAL COUNSEL

January 24, 1975

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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Clerk, United States Court of
Appeals for the Second Circuit
United States Courthouse
Foley Square
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Re: Securities and Exchange Commission, Plaintiff-Appellee v.
Research Automation Corporation, et al., Defendants;
Konstantinos M. Tserpes, Basil Martos, Athan Hamos, Appellants
(C.A. 2, No. 74-2393)

Dear Mr. Fusaro:

Enclosed for filing with the Court are 25 copies of the Brief of the Securities and Exchange Commission, Appellee, and 10 copies of the Supplemental Appendix to that brief, in the above-captioned case.

I certify that I have today caused to be mailed two copies of the foregoing brief and one copy of the Supplemental Appendix to each appellant, as listed below.

Sincerely yours,

Martin S. Berglas

Martin S. Berglas
Attorney
202 755 1168

Enclosures

Copies to: Research Automation Corporation
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